92-697

Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MARTIN G. WANGURI -
PETITIONER

vs.

PORT OF HOUSTON AUTHORITY -
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LIONEL MILLS
COUNSEL FOR PETITIONER
4111 Charleston
Houston, Texas 77021
(713) 741-0860

QUESTION PRESENTED

Does the so-called "remedial provisions" of the Civil Rights Act of 1991 apply retroactively to cases that were pending in the District Court on the effective date of the Act, which became effective on November 21, 1991?

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NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1992

MARTIN G. WANGURI, Petitioner

vs.

PORT OF HOUSTON AUTHORITY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Martin G. Wanguri, respectfully prays that a writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit affirming the Judgment of the trial Court in favor of defendant.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is printed in Appendix A to this Petition. The unpublished recommended ruling of the Magistrate, adopted by the District Court for the Southern District of Texas, appears in Appendix B.

JURISDICTION

The Court of Appeals opinion in this matter was filed on July 22, 1992. This Court's Jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and the Civil Rights Act of 1991. Appendix C.

STATEMENT OF THE CASE

The United States District Court, Southern District of Texas, Houston Division, had Jurisdiction pursuant to Title 42 § 2000(e) et seq.

Petitioner filed suit in the District Court on February 8, 1988, within the statue of limitations governing the right to sue following an EEOC determination. However, an order of dismissal was entered on June 16, 1989, because Plaintiff did not serve the Defendant within 120 days as required under Rule 4(J) of the Federal Rules of Civil Procedure. On October 1, 1990, Plaintiff filed a motion to reinstate. The Court granted the motion October 3, 1990. On October 24, 1991, the case was referred to Magistrate Judge Francis H. Stacy as a Special Master under 42 U.S.C. § 2000e-5(f)(5), on October 24, 1991. The parties signed and approved the

consent from and the case was transferred to Judge Stacy for trial and final Judgment.

Judge Francis H. Stacy entered final Judgment for Defendant on November 26th 1991.

The Court found that Plaintiff's evidence failed to prove that the actions of the Defendant toward him with respect to termination were based on his race or national origin. The Court further found that the Defendant's decision to eliminate Plaintiff's position as a file clerk was based on a legitimate business reason (Court's finding of Fact and Conclusion of Law.R.3). In addition, the Court found that Plaintiff's evidence did not show that reasons given by the Defendant for its actions were pretextual or a cover-up to mask discrimination based on race or national origin. The Court concluded that

Defendant's decision to eliminate Plaintiff's position was not motivated by unlawful discriminatory animus.

Petitioner filed a motion for a new trial on September 6, 1991. Thereafter, the Court denied the petitioner's motion for a new trial on January 7, 1992, and on January 13, 1992, petitioner filed notice of Appeal from the Judgment entered on November 26, 1991.

Petitioner argued before the Court of Appeals for the Fifth Circuit that the appeal involved the proper statutory construction of the Congressional Amendments to the Civil Rights Act of 1964, cited as the Civil Rights Act of 1991.

The Declaration of Policy of the Act, which is the Court's guide in determining its intended scope, provides that its purpose was necessary "<u>to provide</u>

appropriate remedies for intentional discrimination and unlawful harassment in the workplace and declares further to codify the concepts of "business necessity" and job related enunciated by the U.S. Supreme Court in Grigg v. Duke Power Co., 401 U.S. 424 (1971), and in other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

Plaintiff filed this lawsuit in the District Court on February 8, 1988. The Case was tried before the Court October 24 and 25, 1991. The case was under consideration and pending final disposition at the time of the enactment of Civil Rights Act of 1991, as amended on November 21, 1991. The question of retroactivity thus presented is whether the Amendments should be applied to case pending before the court on the effective

date of the Civil Rights Act of 1991, and where a case was awaiting a final decision by the court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reason that a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter.

In Bradley v. School Board of City of Richmond - U.S. (1974), 42 U.S.L.W. 4703 (U.S. May 15, 1974). The Supreme Court held that a statute authorizing a federal court to award attorney's fees in school desegregation cases should have been applied by the Court of Appeals so as to result in the affirmance of the decision of the District which had awarded such fees on the basis of its general equity

power, since the statute was enacted after the District Court's award but before the Court of Appeal's decision. The rational of the Supreme Court's decision was stated as follows:

> We anchor our holding in this case on the principle that a Court is to the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislation history to the Contrary - U.S. at ____, 42 U.S.L.W. at 4707.

Bradley held that the following tests should govern the determination of retroactivity in particular statutes, 416 U.S. at 717.

> (a) The first test is "the nature and identity of the parties." This

test concerns the relative power and resources of the parties. The Court emphasized

(1) the far greater power and resources of the school board, the fact that the dispute between them was not a simple private lawsuit in which the public interest was not engaged; plaintiffs were enforcing the public interest as well as their own rights. The Court cited United States v. Schooner Peggy, 1 Cranch 103, 110 (1801), holding that in cases involving '. . . greater national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.'

(b) The second test is "the nature of their rights." This test concerns the possibility of injustice. The example involved the Court's refusal to apply an intervening change to a pending action where it had concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional. A leading example of a right which had "matured" is Green v. United States, 376 U.S. 149, 11 L.Ed.2d 576, 84 S.Ct. 615 (1964). There, Green had obtained a final adjudication that his security clearance had been unlawfully taken away, and he had filed a back pay claim under a 1 1955 regulation. A 1960 regulation adopted after his claim was filed would have changed the substantive

standards and made it difficult for him to recover. The Court held that Green's rights had matured and become vested, and refused to apply the 1960 regulation retroactively. Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 282, 21 L.Ed.2d 474, 484, 89 S.Ct. 518 (1969), described Green as a case in which retroactive application of the new rule would have worked 'manifest injustice.' and see Int'l Union Electrical Workers v. Robbins & Myers, 429 U.S. 229 (1976), which held that the Congressional extension of the charge-filing period from 90 days to 180 days, in § 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, applied to resurrect the plaintiff's claim even though it was

already untimely when it was filed with the EEOC, because it was still pending with the EEOC on the date of enactment.

(c) The third test is "the nature of the impact of the change in law upon those rights." This concern stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard.' The Court held that this test was met because the Board had theoretically been subject to a fee award under common-law principles, so the enactment of § 718 worked no change in its obligations.

This Court has rendered numerous decisions since Bradley, some of which seem to rely on the Thorpe-Bradley presumption that statutes apply

retroactively to pending cases and some which state and rely on the historical presumption that statutes apply prospectively unless the statute expressly provides otherwise. Thus, without a clear indication of Congressional intent in either the language of the 1991 Civil Rights Act or the Act's legislative history. Therefore, we must turn to Judicially derived rules of constructions in order to resolve this ambiguity.

This Court emphasized in Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989), that it is not within the province of the Court of Appeals to determine when Supreme Court decisions in one line of cases effectively overrule Supreme Court decision in another line of cases. Rodriguez, 490 U.S. at 484, 109 S.Ct. at 1921.

When Congressional intent is clear as to the issue of prospective versus retroactive application, then this intent controls. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 838, 110 S.Ct. 1570, 1577, 108 L.Ed.2d 842 (1990).

Numerous courts have addressed the issue of whether the 1991 Civil Rights applies retroactively to pending cases.

The Courts have various views on the issue of legislative intent. For example, compare Fry v. The Omaha World Herald Co., 960 F.2d 1370, 1378 (8th Cir. 1992) (legislative history indicates an intent to apply the Act prospectively); Vogel v. Cincinnati, 959 F.2d 594, 597 (6th Cir. 1992) (no clear legislative intent can be deciphered from the statutory language or legislative history).

Accordingly, the Sixth and Eighth Circuits opinion conflicts with the

implicit holding of Thorpe and Bradley.

In United States v. Peppertree Apartments, 942 F.2d 1555 (11th Cir. 1991), the Eleventh Circuit acknowledging these conflicting precedents, held that the amendments to the penalty provisions of the National Housing Act, see 12 U.S.C. § 1715z-4a(c), applied retroactively.[1/]

This Court should take the opportunity to clarify its holding in Bradley v. Richmond School Board, supra, relied upon by the Eleventh Circuit in Peppertree. This Court holds explicitly or implicitly, that the general rule requires Courts who faced with new statutory provisions to apply the law at the time of the decision.

[1/]In Bailes v. United States, . . . U.S. . . . 112 S.Ct. 1755, 118 L.Ed.2d (1992), this Court declined to determine whether Courts should apply a statute restroactively and remanded the case to the United States District Court.

This Court should grant Certiorari here to explicitly rule that Thorpe-Bradley presumption that statutes apply retroactively to pending cases and, further, to resolve the conflict between the Circuits created by the Eleventh Circuit's decision in this matter.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and opinion of the Court of Appeals in this matter.[2/]

Dated: October 10, 1992

Respectfully submitted,

Lionel Mills

Lionel Mills
Attorney for Petitioner

[2/]If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinions in Thorpe, supra, and Bradley, supra.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARTIN G. WANGURI	§	
	§	
Plaintiff	§	
	§	
vs.	§	CIVIL ACTION NO.
	§	H-88-0404
	§	
PORT OF HOUSTON	§	
AUTHORITY	§	
Defendant.	§	

FINAL JUDGMENT

On October 28, 1991 through October 29, 1991, this action came on for trial before the Court. United States Magistrate Judge Frances H. Stacy presided pursuant to an order signed by United States District Judge Melinda Harmon on October 24, 1991, appointing her Special Master under 42 U.S.C. § 2000e-5(f)(5). On October 29, 1991, the parties signed a consent ot proceed before the magistrate pursuant to 28 U.S.C. § 636(c). On October 30, 1991, Judge Harmon signed and approved the

APPENDIX A

consent form and the case was transferred to Judge Stacy for trial and Final Judgment.

The issues having been duly tried, and a decision having been duly rendered, for the reasons set fort in the Findings of Fact and Conclusions of law of even date, it is hereby

ORDERED and ADJUDGED that judgment be entered in favor of Defendant the Port of Houston Authority; that Plaintiff Martin G. Wanguri take nothing from Defendant; and that each party bear his own costs.

The Clerk of the Court shall provide a true copy of this Order to all counsel of record.

Signed at Houston, Texas, this 26th day of November, 1991.

Frances H. Stacy

FRANCES H. STACY
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARTIN G. WANGURI	§	
	§	
Plaintiff	§	
	§	
vs.	§	CIVIL ACTION NO.
	§	H-88-0404
	§	
PORT OF HOUSTON	§	
AUTHORITY	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a disparate treatment case brought by Martin G. Wanguri who alleges that the Port Authority, his former employer, discharged him because of his race and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The case came on for trial from October 28, 1991 through October 29, 1991 by written consent before the Court, Honorable Frances H. Stacy, United States Magistrate

Judge, presiding. The following Findings of Fact and Conclusions of Law are made pursuant to Fed. R. Civ. P. 52.

I. FINDINGS OF FACT

1. On February 8, 1988, Wanguri filed suit within the statute of limitations governing the right to sue following an EEOC determination. However, an order of dismissal was entered on June 16, 1989, because Wanguri did not serve the Authority within 120 days as required under Rule 4(j) of the Federal Rules of Civil Procedure. Wanguri filed a motion to reinstate on October 1, 1990. The Court granted the motion on October 3, 1990.

2. The case was referred to Magistrate Judge Frances H. Stacy as a Special Master under 42 U.S.C. § 2000e-5(f)(5) on October 24, 1991. On October 29, 1991, the

parties signed a consent to proceed form. On October 30, 1991, Judge Melinda Harmon signed and approved the consent form and the case was transferred to Judge Stacy for trial and Final Judgment.

3. Plaintiff, Martin G. Wanguri ("Wanguri"), a adult Black male born in Kenya, East Africa, is a permanent resident of the United States residing in Houston, Texas.

4. Defendant, Port of Houston Authority (the "Authority") is an employer with fifteen (15) or more employees.

5. Wanguri was an "employee" of the Authority and the Authority is an "employer" as those terms are defined in Title VII of the Civil Rights Act of 1964, as amended ("Title VII").

6. Wanguri was an at will salaried employee of the Authority.

7. The Authority hired Wanguri on December 10, 1979 as a Control Room Operator--Step 1 for the Barbour's Cut Terminal. The Authority moved Wanguri to Control Room Operator--Step effective July 1, 1980. The Authority granted Wanguri an indefinite leave without pay effective November 9, 1981, because of an accident.

8. During his leave, the Control Department was reorganized into the Research, Control and Filing Department. Wanguri returned to work at the Barbour's Cut Terminal on January 1, 1983, as a File Clerk. [Plaintiff's Exhibit "L" and "Q".

9. The Authority provided annual performance reviews reporting on the previous twelve (12) month period. The rating scale was from "1" - Provisional to "5" - Distinguished. Wanguri's 1984 and 1985 performance reviews rated his overall work performance as "3" - Competent. His

1986 performance review reflects a reduction to "2" - an Adequate rating.

10. On January 13, 1986, Wanguri requested and was granted a transfer to a CRT Operator position. He made the request to his immediate supervisor Audra Connors ("Connors"), who in turn contacted her supervisor, John Hare ("Hare"), assistant manager for Barbour's Cut Terminal, for approval. On February 7, 1986, James Hare met with Wanguri to discuss his performance as a CRT Operator. Effective February 10, 1986, Wanguri was returned to the filing position because of his difficulties with the speed and accuracy required of a CRT Operator. Wanguri remained in the File Clerk capacity until his termination November 28, 1986.

11. On March 7, 1986, Connors reported to Hare that Wanguri was not performing

his duties in the filing department at "acceptable standards."

12. Rita Wade, a Black female U.S. citizen, observed disparate epithets spoken by Wanguri's co-workers. She did not observe any disparate treatment toward Wanguri by members of the management team of the Barbour's Cut Terminal.

13. In June 1986, an outside consulting firm began an efficiency study for the Barbour's Cut Terminal. The study, including cost cutting recommendations, was completed in the beginning of October 1986. One result of this efficiency study was the recommendation that 50% of the File Clerk positions at Barbour's Cut Terminal be eliminated. At that time, Wanguri was the only full-time File Clerk. There were two part-time casual File Clerks from a temporary service. Both of these

temporary casuals were adult white females.

14. On October 11, 1986, the upper management[1] of Barbour's Cut Terminal held a meeting to review the efficiency recommendations. Based on the recommendations, a determination was made to lay off all File Clerks. The positions were eliminated. The efficiency study showed that filing could easily be performed by the CRT Operators after they entered the interchanges into the computer. This was practical for the volume of filing the Authority experienced in 1986.

15. On November 18, 1986, the Authority implemented changes in the employee handbook regarding the lay off policy. The Authority notified all

[1]Hare was not included in this meeting.

employees of the change. Wanguri admitted receiving a copy of the changes and inserting them into his employee handbook.

16. The previous lay off policy provided that "in the event lay offs occur, an employee may utilize his/her seniority date to displace a junior contract monthly employee within his department if, in the opinion of the Authority's management, the employee is qualified to hold that position." The recall period was for twenty four (24) months from the lay off date.

17. The November 1986 change eliminated the laid off employee's bumping rights and reduced the recall period to six (6) months.

18. Wanguri was notified on November 28, 1986 of his lay off effective December 12, 1986 and of his recall status for the following six months.

19. Wanguri filed a grievance report as per the employee handbook on December 9, 1986, against Hare. A meeting was held between Wanguri and the Managerial Review Committee on December 11, 1986. During the meeting Wanguri spoke at length about the various interpersonal relationships between co-workers and supervisors which he felt were the "real" reason for his termination. During the discussion the committee members pointed out that the notice of termination stated ". . . restructure . . . position . . . eliminated." In a follow up letter to Wanguri the committee reiterated the lay off was the result of a "broad cost reduction procedure implemented for Barbour's Cut Terminal."

20. On December 11, 1986, Wanguri filed a complaint with the Texas Commission on Human Rights and the EEOC

alleging discrimination on the basis of race and national origin. The EEOC determination of October 26, 1987 stated that (1) Wanguri's "position was abolished based on a consultant study's recommendation that File Clerk positions be eliminated;" (2) Wanguri was classified as a "File Clerk, not as a Research Specialist, as he claimed;" (3) all personnel similarly situated were also laid off; and (4) although Wanguri was the only full-time File Clerk, none of the employees cited by Wanguri as comparable were similarly situated by occupation. Based on this analysis, the EEOC determined that the evidence obtained during the investigation did not establish a violation under Title VII.

21. Wanguri's evidence failed to prove that the actions of the Authority toward

him with respect to termination were based on his race or national origin.

22. The Authority's decision to eliminate Wanguri's position as File Clerk was based on a legitimate business reason. Wanguri's evidence did not show that reasons given by the Authority for its actions were pretextual or a cover-up to mask discrimination based on his race or national origin.

23. The Authority's decision to eliminate Wanguri's position was not motivated by unlawful discriminatory animus.

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter pursuant to Title VII of the Civil Rights act of 1964, 42 U.S.C. § 2000e et seq.

2. Title VII of the Civil Rights Act of 1964 reads in relevant part:

> (a) It shall be an unlawful practice for an employer . . . (1) . . . to discharge any individual . . . because of such individual's race . . . or national origin; or (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . . or national origin.

42 U.S.C. § 2000e-2(a) (1982).[2]

DISPARATE IMPACT THEORY OF DISCRIMINATION

3. A disparate impact violation is made out when an employer is shown to have used a specific employment practice, neutral on its face but causing a

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[2] A violation of Title VII can be shown in two separate and distinct ways: Disparate impact or disparate treatment. Nelson, The Standard of Appellate Review in Title VII Disparate-Treatment Actions, 50 U.Chi.L.Rev. 1481, 1482 (1983). Wanguri's pleadings alleged a disparate impact as well. Thus the Court will address both theories of discrimination.

substantial adverse impact on a protected group, and which cannot be justified as serving a legitimate business goal of the employer. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 646, 652-54 (1989).

4. The burden of showing disparate impact always remains with the plaintiff and the employer has only the burden of production, on the issue of business justification, once a prima facie case has been established. EEOC v. Metal Service Co., 892 F.2d 341 (3rd Cir. 1990).

5. A prima facie case of disparate impact is established by showing through significant statistical disparity that a racially neutral employment practice has a discriminatory impact on a protected class. No proof of intentional discrimination is necessary. Watson v. Ft. Worth Bank and Trust, 487 U.S. 977,

993 (1988); Connecticut v. Teal, 457 U.S. 440, 446 (1982).

6. Wanguri failed to show any significant statistical disparity evidence to establish a prima facie case to prevail under a disparate impact theory of discrimination.

DISPARATE TREATMENT THEORY OF DISCRIMINATION

7. A disparate treatment prima facie case is established when a plaintiff shows that he was treated less favorably then similarly situated employees and that the defendant's intent was discriminatory. Unlike the disparate impact theory, proof of the defendant's discriminatory motive is critical under disparate treatment analysis. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977); Texas Department of

Community Affairs v. Burdine, 450 U.S. 248 (1981). Discriminatory intent can either be shown by direct evidence, see, e.g. Slack v. Havens, 7 F.E.P. Cas. 885 (S.D. Cal. 1973), aff'd as modified, 522 F.2d 1091 (9th Cir. 1975), or through indirect or circumstantial evidence. See, e.g. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

8. A prima facie case is established when the plaintiff produces sufficient evidence of disparate treatment so that a causal link between the plaintiff's race and the plaintiff's discharge can be inferred. Id. at 802. Such a link, however, merely creates a presumption which the defendant may rebut by articulating a legitimate nondiscriminatory reason for the plaintiff's discharge. Burdine, 450 U.S.

at 254; McDonnell Douglas Corp., 411 U.S. at 802-04.

9. Wanguri failed to establish even a prima facie case of discrimination. Occasional disparate comments made by co-workers does not establish sufficient evidence that the Authority's motive behind his discharge was discriminatory. Clark v. South Cent. Bell Tel. Co., 419 F.Supp 698, 706 (W.D. La. 1976) (company not responsible for racial slurs or jokes of employees absent encouragement or condonation by supervisors). Wanguri introduced no evidence that the Authority's management took part in or approved of his co-workers' behavior. Wanguri testified that one of the individuals making the disparate comments was transferred by the Authority to another department upon notice of the individual's actions. Therefore, the

Authority took appropriate steps when informed of disparate epithets.

10. Where a defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff did so is no longer relevant. United States Postal Service Board of Governors v. Aikens, 460 U.S 711, 714-715 (1983). Nor is it necessary to decide whether a plaintiff met the burden of establishing a prima facie case where the defendant has articulated a legitimate, nondiscriminatory reason for its actions. Andre v. Bendix Corp. 774 F.2d 786, 792 (7th Cir. 1985); Box v. A & P Tea Co., 772 F.2d 1372, 1378 (7th Cir. 1985).

11. Regardless of Wanguri's failure to meet his burden, the Authority articulated a legitimate nondiscriminatory business reason for discharging all Barbour's Cut

Terminal File Clerks, namely, to reduce costs as per an outside consulting firm's efficiency study recommendation.

12. Any finding of fact which should be more properly designed as a conclusion of law is hereby designed as such. Any conclusion of law which should be more properly designated a finding of fact is hereby designated as such.

The Clerk of the Court shall provide a true copy of this Order to all counsel of record.

Signed at Houston, Texas, this 26th day of November, 1991.

Frances H. Stacy

FRANCES H. STACY
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-2020
Summary Calendar

MARTIN G. WANGURI,

Plaintiff-Appellant

versus

PORT OF HOUSTON AUTHORITY

Defendant-Appellee

Appeals from the United States District Court for the Southern District of Texas (CA H 88 0404)

Before SMITH, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

PER CURIAM:*

The Judgment of the trial court in favor of Defendant-Appellee is AFFIRMED. Local Rule 47.6(1)

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

AMENDMENTS TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The Civil Rights Act of 1991, applicable provisions of, (1) Section 101(b), which expands the definition of what constitutes the making and enforcement of a contract for Section 1981 claims; (2) Sections 104 and 105, which pertain to the business necessity defense for disparate impact cases under Title VII; (3) Section 102, which makes compensatory and punitive damages available for intentional discrimination claims under Title VII; (4) Section 102(c), which pertains to the availability of a jury trial under Title VII. [FN1] See Pub.L. No. 102-166; 105 Stat. 1071.

APPENDIX C

Supreme Court, U.S.
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No. 92-697

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

MARTIN G. WANGURI

Petitioner,

v.

PORT OF HOUSTON AUTHORITY,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

T. J. Wray
Counsel of Record

Fulbright & Jaworski
R. Michael Moore
Teri L. Danish
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(713) 651-5151

Counsel for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Civil Rights Act of 1991 should apply retroactively to a case in which the underlying facts occurred approximately five (5) years prior to the effective date of the Act and which was tried in District Court prior to the effective date of the Act.

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STATEMENT OF THE CASE

Petitioner Martin G. Wanguri ("Petitioner") filed suit in the United States District Court for the Southern District of Texas, Houston Division on February 8, 1988 (R.5), alleging that Respondent Port of Houston Authority ("Respondent"), discharged him because of his race (Black) and national origin (East African) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") (R.5).

On June 19, 1989, after more than one year had passed without service of the Complaint on the Port, the District Court entered an Order of Dismissal pursuant to Rule 4(j) of the Federal Rules of Civil Procedure (R.6). On June 22, 1990, Petitioner filed a Motion to Reinstate his Complaint (R.7). By Order dated October 15, 1990, the District Court granted Petitioner's Motion to Reinstate (R.12).

Respondent had no notice of any of the foregoing until service of the Plaintiff's Original Complaint on October 19,

1990 (R.24-25). The District Court allowed Respondent to file a response to Plaintiff's Motion to Reinstate (R.20). On January 2, 1991, Respondent filed its Opposition to Petitioner's Motion to Reinstate, or alternatively, Motion to Dismiss (R.25). The District Court denied Respondent's Motion to Dismiss on October 25, 1991 (R.134).

The case was tried before the Honorable Frances H. Stacey, United States Magistrate Judge, on October 28 and 29, 1991 (R.146-147). Both parties consented to final judgment by Magistrate Judge Stacey pursuant to 28 U.S.C. §636(c) (R.136). On November 29, 1991, the District Court entered Findings of Fact and Conclusions of Law (R.175). The District Court held that Petitioner failed to prove that Respondent's actions regarding Petitioner were based on his race or national origin (R.171). The District Court held that Petitioner failed to establish a *prima facie* case of disparate treatment (R.166). The District Court further held that, regardless of Petitioner's failure to meet his burden of proof, Respondent produced a legitimate nondiscriminatory reason

for discharging Petitioner that was not pretextual (R.167, 171). In addition, the District Court found that Petitioner did not plead a "disparate impact" theory of recovery, but nonetheless held that Petitioner failed to show any significant statistical disparity to establish a *prima facie* case of disparate impact discrimination (R.169). The District Court entered judgment in favor of Respondent (R.176-177).

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court in an unpublished, *per curiam* decision.

REASONS FOR DENYING THE WRIT

There is no reason to consider whether the Civil Rights Act of 1991 ("the Act") should apply to this case, because retroactive application of the Act would have no effect on its outcome.[1/] Prior to trial, Petitioner did not plead

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[1/] Indeed, this case should have been dismissed prior to trial pursuant to Rule 4(j) of the Federal Rules of Civil Procedure. The Complaint was served on Respondent more than 120 days after filing, and Petitioner never established good cause for his failure to comply with Rule 4(j). Respondent presented this argument to the Court of Appeals, which was not addressed in the one-page decision affirming the District Court's

or otherwise assert that any policy of Respondent had a discriminatorily disparate impact on a protected class of employees. Rather, Petitioner only alleged intentional discriminatory treatment under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* ("Title VII"), the analysis of which remains unchanged under the Civil Rights Act of 1991. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Title VII, as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), specifically outlines the elements necessary to establish "disparate impact" discrimination. 42 U.S.C. §2000e-2(k)(1)(A)(i). A party may establish a cause of action based on disparate impact only if the party demonstrates the existence of a particular employment practice that causes a disparate adverse impact on the basis of a protected class of employees, which the employer cannot demonstrate is job

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decision.

related and consistent with business necessity.[2/] During trial, as the District Court correctly found, Petitioner presented no competent evidence of a policy that disparately impacted a protected class of employees. Not only did Petitioner fail to identify a policy that allegedly was discriminatory, he failed to produce any statistical analysis of any disparate impact on any protected group of employees. Thus, any change in the burden of proof under the Civil Rights Act of 1991 would have no effect because Petitioner presented no initial *prima facie* case of disparate impact.

The underlying facts in this case occurred approximately five (5) years prior to November 21, 1991, the effective date of the Civil Rights Act of 1991. Trial in this case occurred in October 1991, again prior to the effective date of the Civil Rights Act of 1991. Petitioner, however, asserts that the Civil Rights Act of 1991 should apply to this

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[2/] That section of Title VII also provides that the complaining party may demonstrate the existence of an alternative employment practice that has less disparate impact than the challenged one, but the employer refuses to adopt the alternative practice. 42 U.S.C. §2000e-2(k)(1)(A)(ii). Petitioner made no such showing in this case, and therefore that provision is irrelevant here.

case, and cites this Court's decision in *Bradley v. Richmond School Board,* 416 U.S. 696 (1974) in support of this assertion. The *Bradley* opinion dealt with retroactive application of an attorney's fee provision of the Education Amendments Act of 1972, and does appear to create a presumption of statutory retroactivity. That apparent presumption, however, is questionable in light of the more recent decision in *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204 (1988), in which the Court articulated a presumption against retroactivity. The "apparent tension" between these two cases has been recognized, but not resolved. *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827 (1990).

Although the *Bradley* decision permitted retroactive application of the statute involved, the Court also stated that the decision did not "hold that courts must always apply new laws to pending cases in the absence of clear legislative direction to the contrary." *Bradley, Supra,* 416 U.S. at 716. The *Bradley* decision, therefore, did not hand down a blanket

rule of retroactivity. Rather, the legislative history of the statute involved in *Bradley* contained "implicit support" for retroactive application. In contrast, no such support exists in the Civil Rights Act of 1991. The Act's legislative history presents little or no assistance in resolving this issue.

All but one circuit courts of appeals that have addressed this issue have held that the Civil Rights Act of 1991 does not apply retroactively. *See Baynes v. AT&T Technologies Inc.*, __F.2d __, U.S. App. LEXIS 26892 (11th Cir. 1992); *Gersman v. Group Health Association, Inc.*, 975 F.2d 866, 1992 U.S. App. LEXIS 21615 (D.C.Cir. 1992); *Landgraf v. USI Film Products, et al.*, 968 F.2d 427, 1992 U.S. App. LEXIS 17414 (5th Cir. 1992); *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Mozee v. American Marine Service Co.*, 963 F.2d 929 (7th Cir.), *cert. denied*, No. 92-248 (Oct. 5, 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *but see*

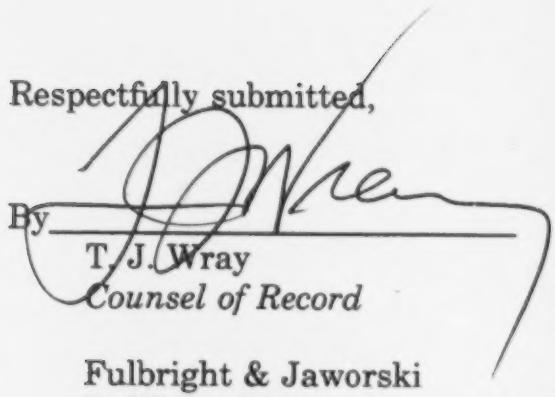
Davis v. City and County of San Francisco, __ F.2d __, 1992 U.S. App. LEXIS 24836 (9th Cir. 1992).

As noted, this Court has already denied a Petition for Writ of Certiorari on this issue in *Mozee v. American Marine Service Co., supra*. Respondent respectfully submits that the reasoning and results of the decisions by the vast majority of circuit courts of appeals are correct and that the Act should not be applied retroactively to a case that was tried prior to the Act's effective date.

CONCLUSION

Petitioner has demonstrated no compelling reason to review this case. Even if the Civil Rights Act of 1991 were applied retroactively to this case, the outcome would remain unchanged. As a result, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,



By _____
T. J. Wray
Counsel of Record

Fulbright & Jaworski
R. Michael Moore
Teri L. Danish
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713)651-5151

Counsel for Respondent